SUPREME COURT, U. S. 73 - 651

Supreme Court, U. S.
FILED
OCT 15 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. A-342

STEPHEN ECONOMY,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THEODORE KRIEGER
Attorney for Petitioner
401 Broadway
New York, New York 10013
(212) WO 6-5911

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5358

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Statute Involved	
Reason for Granting the Writ	8
POINT I — The Evidence Was Insufficient to Warrant the Appellant's Conviction for Knowing Possession of Goods Stolen from Foreign Commerce	8
POINT II — The Petitioner Incorporates by Reference the Points Set Forth in the Brief of His Co-Petitioner, Joseph Cardillo	10
Conclusion	10

TABLE OF CASES

Glasser v. United States, 315 U.S. 60 (1942)	8
Tot v. United States, 319 U.S. 463, 467, 87 L.Ed. 1519, 1524, 63 S.Ct. 1241	9
United States v. Casalinuovo, 350 F.2d 207, 209 (2nd Cir. 1965)	8
United States v. Kearse, 444 F.2d 62 (2nd Cir. 1971)	10
United States v. Nitti, 444 F.2d 1056, 1059 (7th Cir. 1971)	9

Table of Cases (Continued) Page

United States v. Romano, 382 U.S. 136 (1965) 9

United States v. Steward, 451 F.2d 1203 (2nd Cir. 1971) 10

United States v. Vilhotti, 452 F.2d 1186 (2nd Cir. 1971) at 1188 9

OTHER AUTHORITIES

Title 18, United States Code, Section 659 8

APPENDIX

Order of Court of Appeals A-1

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1973

No. A-342

STEPHEN ECONOMY,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner, Stephen Economy, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on August 16, 1973.

OPINION BELOW

The Court of Appeals for the Second Circuit did not render an opinion nor did the District Court for the Eastern District of New York.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 16, 1973. This Court's jurisdiction is invoked under Title 28 U.S.C. §1254(1).

An application for an extension of time to file this petition was timely made and permission was granted extending the time to do so through and including October 15, 1973.

QUESTION PRESENTED

Was the evidence sufficient to warrant the petitioner's conviction for knowing possession of goods stolen from interstate commerce?

STATEMENT OF THE CASE

The petitioner, Stephen Economy, was charged by indictment with knowing possession of stolen goods and conspiring to do so. He was tried before Judge John Dooling and a jury in the United States District Court for the Eastern District of New York. The petitioner was convicted only on the charge of possession. He was sentenced to imprisonment for three (3) years, all but six (6) months of which was suspended and placed on probation for five (5) years.

On August 16, 1973 the judgment was affirmed without opinion by the United States Court of Appeals for the Second Circuit.

The petitioner has been released on his own recognizance by way of a personal bond in the amount of Twenty-Five Thousand ($25,000.00) Dollars.

STATEMENT OF FACTS

The petitioner together with Joseph Cardillo and Emilio Jovino proceeded to trial before Judge John F. Dooling and a jury in the United States District Court for the Eastern District of New York.

The proof as adduced by the government in support of the indictment can, as applicable to the appellant, be synthesized in the following narration.

Joseph Martorana testified that he had previously twice been convicted of a crime, *i.e.*, buying stolen meat and possessing a concealed weapon.

He stated that he had earlier in the day entered a plea of guilty to the conspiracy count of the indictment and related that he knew each of the defendants on trial.

Martorana narrated that on July 19, 1972, he was employed as a truck driver and during the course of his duties arrived at Pier 39 on the Brooklyn waterfront. While there he met Emilio Jovino who asked him whether he would be "interested in taking a load out, I could make some money." Martorana responded by asking "What's in it for me?" Jovino was then alleged to have respondent "Don't worry about it, you will be taken care of, . . . you can make a good buck on it." (D.App. 89a-91a).*

Thereupon Martorana and Jovino loaded the truck with crates containing the cigarette lighters. The former drove the truck off the pier and he then asked Jovino what he was going to do with it. The latter replied that he would meet him at the 39th Street Diner. However, he did not do so. Martorana continued to make deliveries (D. App. 92a-99a).

---

*The prefix "D. App." refers to the petitioner's appendix heretofore filed.

On the following date he telephoned Jovino and told him that he was at *Joy's Pub*, and inquired as to what he was to do with the freight that had remained on his truck. He was told "Don't worry about it. It will be taken care of. Just wait there." (D. App. 119a).

Thereafter the petitioner arrived, asked whether he had the lighters, and upon receiving an affirmative response was told to wait, "*I might have a buyer for you,*" and then *departed.* (D. App. 123a).

The petitioner then returned with an unidentified individual, a conversation ensued and *Economy gave Martorana a card.* He then told him to "*Bring the merchandise to this place. The money is good.* You will get it tomorrow. Don't worry about it. It is guaranteed, the money." (D. App. 125a).

Thereupon Martorana drove to the designated place, *i.e.*, the Surprise Shop at Court and Union Streets, entered, inquired as to the whereabouts of the owner, and was directed to the co-petitioner Joseph Cardillo. Martorana told him that he had fifteen cases for him and was told that it was to go down the cellar.

They then began to take the cases off the truck. While so doing Martorana received a telephone call. Martorana, Cardillo and Economy, who was in a luncheonette across the street, were then arrested. (D. App. 144a-151a).

Raymond Schackett, the vice-president of E & S Friedman Associates, Baldwin, New York, then testified as to the shipment coming from Japan to Baldwin and introduced various shipping documents with respect thereto.

Charles Dugan, a special agent for the Waterfront Commission of New York Harbor, testified that on July 20, 1972, he was maintaining surveillance of Martorana's truck. While so

doing he observed the petitioner and an unknown male park, enter Joy's Bar and immediately thereafter drive away. Later in the day they returned to the Bar, then left the bar in the Company of Martorana, converse, and the Petitioner and the unknown male again departed.

Agent Dugan further related that he followed Martorana's truck to the Surprise Shop, and saw the petitioner enter a candy store across the street therefrom.

Samuel Chambers, also a special agent for the Waterfront Commission, testified that immediately prior to arresting the petitioner he overheard him making a telephone call and saying, "The cops are here." (D. App. 401a).

The Government thereupon rested and the petitioner then moved for a directed judgment of acquittal. The application was denied as to the substantive count with the Court holding that there was "enough to put him at least in joint possession of the load with Jovino call it constructive possession if you will." (S.M. 476).*

However, the motion to dismiss was granted as to the conspiracy count with the Court saying, "I just feel that it would be speculating as to his knowledge of the interstate shipment." (S.M. 486).

The petitioner testifying on his own behalf stated that he was a longshore checker duly licensed by the Waterfront Commission of New York Harbor. That on July 20, 1972, he did meet Joseph Martorana at a bar who inquired whether he desired the company of a prostitute. After declining the same, the petitioner returned to the pier.

Later that day he returned to the bar in connection with a

*The prefix "S.M." refers to the stenographic minutes of the trial.

retirement party for several co-employees. He then left the bar to visit his mother, returned and met Martorana outside the bar who asked him to solicit for him. Thereafter he returned to the pier and at the close of the working day went to the union hall. However, prior to entering he stopped to telephone his wife and while so doing was arrested.

The petitioner stated that he had never prior to his arrest, seen either Jovino or Cardillo or even been in the latter's shop. He further denied ever having seen the card which he was alleged to have given to Martorana or written on the back thereof.

The petitioner specifically denied ever having had a conversation with Martorana as to fifteen cases of cigarette lighters, or ever having been shown them or where Martorana could take them.

John Libretti, James Martyn and Robert J. Martyn, fellow employees corroborated the petitioner's testimony as to the conversations with Martorana.

The petitioner rested and the Government called Robert E. Walsh, an agent of the Waterfront Commission in rebuttal. He corroborated the earlier testimony that the petitioner and an unknown male had on July 20, 1972 entered and left the bar, and that later that day Economy entered Joe's luncheonette.

At the conclusion of the entire case the petitioner again moved for a directed judgment of acquittal. The Court in denying the motion said: "He has constructive possession or nothing. If he hasn't got constructive possession, no case against him." (S.M. 1108).

The Court charted the jury that the government did not introduce evidence that the petitioner "ever actually touched any of the crates of lighters." It also instructed the jury that one can also have legal possession without having immediate

physical control of an article if one has the power to control and dispose of its possession." (D. App. 1241a).

Exception was taken by the petitioner as to that portion of the charge which set forth that:

> "The third essential element is that the defendant whose case you are considering knew when he received or was in possession of the cigarette lighters that they were stolen goods. Again, the government need not present direct proof of what was in defendant's mind, but it must prove facts and circumstances from which you are able to infer beyond a reasonable doubt that the defendant knew that the goods were stolen. Possession of goods recently stolen, unless that possession is explained, is in itself evidence from which you may, but you are not required to, infer that the defendant so having possession knew that the goods were stolen." (D. App. 1243a).

The cause was submitted to the jury which returned a verdict of guilty as to the petitoner. A motion to set aside the verdict for a new trial as well as a renewed application for a judgment of acquittal were made and denied.

REASON FOR GRANTING THE WRIT

POINT I

THE EVIDENCE WAS INSUFFICIENT TO WARRANT THE PETITIONER'S CONVICTION FOR KNOWING POSSESSION OF GOODS STOLEN FROM FOREIGN COMMERCE.

Section 659 of Title 18, United States Code, provides in part that whoever buys or receives or has in his possession any such goods or chattels constituting an interstate shipment, knowing the same to have been stolen, shall be deemed to have violated said statute.

No proof was ever adduced as to buying, selling, or physical possession by the petitioner and the government thus relied upon a purported constructive possession. In so doing it failed to establish either dominion or control but at best actions which tended to infer a facilitation of the disposal of the goods.

There is no conflict with the proposition that at this appellate juncture the evidence must be reviewed in a light most favorable to the government. *Glasser v. United States*, 315 U.S. 60 (1942). Yet that evidence, even when so viewed, does not establish that dominion and control sufficient and necessary to create construtive possession of the fifteen (15) crates of lighters. For possession means actual care, control and management. It does not mean a flittering about, acting as a conduit, dependent upon others, lacking power and incapable of altering a pre-arranged succession of events.

Veritably, there being no actual possession, it was necessary for the government to establish that constructive possession which was held in *United States v. Casalinuovo*, 350 F.2d 207, 209 (2nd Cir. 1965) to be "such a nexus or relationship between the defendant and the goods that it is reasonable to treat the extent of the defendant's dominion and control as if it

were actual possession.'"

It is submitted that the proof of dominion and control necessary to show such possession has simply not been demonstrated. *United States v. Nitti*, 444 F.2d 1056, 1059 (7th Cir. 1971).

Indeed the government has proven naught but peripheral presence and the petitioner's status as a messenger. Admittedly it did not establish actual possession of the stolen crates. Indeed the petitioner's acts carry no legitimate, rational or reasonable inference that he was engaged in an independent, specialized function sufficient to constitute dominion and control.

This Court in *United States v. Romano*, 382 U.S. 136 (1965), in holding that presence carried no inference of the crime of possession, stated at 141:

> "Presence tells us only that the defendant was there and very likely played a part in the illicit scheme. But presence tells us nothing about what the defendant's specific function was and carries no legitimate, rational or reasonable inference that he was engated in one of the specialized functions connected with possession, rather than in one of the supply, delivery or operational activities having nothing to do with possession. Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt — 'the inference of the one from proof of the other is arbitrary . . .' *Tot v. United States*, 319 U.S. 463, 467, 87 L.Ed. 1519, 1524, 63 S.Ct. 1241."

The Second Circuit itself held in *United States v. Vilhotti*, 452 F.2d 1186 (2nd Cir. 1971) at 1188, that:

> "It is well settled that in order to justify a conviction for receiving or possessing stolen goods under Section 659, the

> . . . government must establish that the defendants exercised dominion or control over the goods."

Pointedly it had held earlier in *United States v. Kearse*, 444 F.2d 62 (2nd Cir. 1971), that the defendant's mere presence but six feet away from 40 cartons of stolen merchandise which practically filled a small living room was an insufficient basis to warrant a conviction for possession under Section 659. The Court made clear that the defendant's momentary presence prior to arrest was legally insufficient to establish any degree of knowledge in the absence of which there could be no dominion or control.

Parenthetically it has also been held that a defendant's mere presence as the driver of an automobile carrying a passenger who had possession of narcotics was insufficient to attribute possession to said defendant. *United States v. Steward*, 451 F.2d 1203 (2nd Cir. 1971).

In shore, there was simply that paucity of evidence needed to warrant a conviction. Predicated upon that evidentiary insufficiency, the trial court should have granted the application for a judgment of acquittal. Its failure to do so constituted reversible error.

POINT II

THE PETITIONER INCORPORATES BY REFERENCE THE POINTS SET FORTH IN THE BRIEF OF THE CO-PETITIONER, JOSEPH CARDILLO.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

THEODORE KRIEGER
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of August one thousand nine hundred and seventy-three.

Present: HON. WILLIAM H. MULLIGAN, HON. JAMES L. OAKES, HON. WILLIAM H. TIMBERS, Circuit Judges,

---

73-1579 — 73-1740

United States of America,
Plaintiff-Appellee,

v.

Joseph Martorana, Joseph Cardillo, Stephen Economy, and Emilio Iovino,
Defendants,

Joseph Cardillo, Stephen Economy,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk

by: VINCENT A. CARLIN,
Chief Deputy Clerk